(3)

No. 06-440

IN THE

Supreme Court of the United States

RODERICK KEITH MCDONALD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

Eric H. Holder, Jr.
Robert A. Long, Jr.
Nicholas Cartier
COVINGTON & BURLING LLP
1201 Penn. Ave., N.W.
Washington, DC 20004
(202) 662-6000

Kenneth W. Starr
Counsel of Record
Rick Richmond
Christopher Chiou
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

Jennifer Atkins
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

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INTRODUCTION

Both issues presented by this case warrant this Court's review. By manipulating case assignment procedures to bring about a racially non-diverse jury pool, the government effectively denied petitioner, a prominent and well-respected African-American public official, a jury of his peers. The Ninth Circuit's blinking at these racial gerrymandering tactics deepens a divide among the lower courts regarding the balance between due process rights and prosecutorial discretion, squarely presenting an issue ripe for this Court's review. The court compounded the manifest injustice meted out to petitioner when it allowed to stand a conviction based on a jury instruction that omitted a critical element of the crime charged. This Court's intervention is thus doubly needed. Indeed, the conspiracy conviction is so palpably improper that the Court may wish to consider summary reversal.

ARGUMENT

1. The Ninth Circuit's decision permits prosecutors to gerrymander an African-American defendant's case into a forum where the government is assured of obtaining a predominantly white jury pool. In the Twenty-first Century, this should not be. The decision below violates fundamental principles of due process and conflicts with the decisions of numerous lower courts.

a. In defending the Ninth Circuit's decision on the merits, respondent contends that a presumption of regularity supports prosecutorial decisions absent clear evidence that the prosecutor's act was both motivated by a discriminatory purpose and had a discriminatory effect. Br. in Opp. 13-14. The law, however, is not nearly so clear. To the contrary, state courts have held that when alleging discriminatory intent in connection with venue selection, a defendant need only raise an inference of discrimination to establish a *prima facie* case under the framework prescribed by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), whereas the Eighth Circuit

has held the opposite. *Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998).

Respondent nevertheless argues that there is no conflict warranting this Court's review. Br. in Opp. 14-16. Yet, respondent concedes that in *Osmulski v. Becze,*, 638 N.E. 2d 828, 832-834 (Ind. Ct. App. 1994), the court "conclude[d] that the *Batson* framework *directly applies* to the venue-transfer situation." Br. in Opp. 15-16 (emphasis added) (citing to *Osmulski*, 638 N.E.2d at 833). Respondent attempts to distinguish *New Mexico v. House*, 978 P.2d 967 (N.M.), *cert. denied*, 529 U.S. 894 (1999), on the grounds (i) that the court observed there was "little jurisprudence" on principles to be applied to the selection of venue; (ii) that the court adopted a "modified" *Batson* test to determine whether venue selection was discriminatory; and (iii) that the court ultimately found no evidence of discriminatory intent or effect. Br. in Opp. 15-16. Those purported distinctions fail to diminish the direct *Batson*-driven conflict among the courts.

First, the so-called "modified" *Batson* test applied in *House* involves the *same* analysis for venue selection as would apply to peremptory challenges: (i) the defendant must make out a *prima facie* case of racial discrimination in the State's motion to select a particular venue; (ii) the State must present a race-neutral explanation; and (iii) once a race-neutral explanation is advanced, the trial court must resolve whether the defendant has proven intentional racial discrimination. *House*, 978 P.2d at 994-95. These steps are *identical* to those articulated by this Court in *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam), describing the appropriate procedure for evaluating peremptory challenges under *Batson*.

Second, the ultimate result in *House* stems from the government's having come forward with *plausible* race-neutral explanations, in stark contrast to the absence of any such explanations in the case at hand. In *House*, the State articulated several race-neutral explanations for

changing venue, including the fact that the selected venue "had not been subjected to the frequent, pervasive, contemporaneous, and highly prejudicial publicity regarding the case." *House*, 978 P.2d at 994. The selected venue also "had a much larger population than the small close-knit community of [the original venue] and would be less likely to be tainted by the prejudicial publicity." *Id.* While the court deemed those justifications "plausible," *id.*, the government's reasons for maneuvering Mr. McDonald's case into Orange County are emphatically not.

Respondent concedes that at most *three* paragraphs of the fifty-seven paragraph indictment even mention Orange County. Br. in Opp. 8-9. The contention that those paragraphs described "overt acts" that were "critical" to proving the charged crime, *id.*, is contrary both to the law and to the record. An overt act is not an element of a conspiracy under 18 U.S.C. § 1951 (a). *See* United States Court of Appeals for the Ninth Circuit, Manual of Model Criminal Jury Instructions § 8.16; *United States v. Pistone*, 177 F.3d 957 (11th Cir. 1999)(per curiam); *United States v. LiCausi*, 167 F.3d 36, 46 (1st Cir. 1999); *United States v. Maldonado-Rivera*, 922 F.2d 934, 983 (2d Cir. 1990). Respondent conceded before the Ninth Circuit, as required by the record, *see e.g.*, E.R. 100-103, that the allegations relating to the Southern Division merely described non-criminal business activities of a non-party who was not an alleged member of the conspiracy. *See* U.S. 9th Cir. Br. 21-22. Respondent's representation that Mr. McDonald was indicted in the Southern Division because the allegations relating to that division were "critical" to proving the conspiracy charge does not, and cannot, account for why Mr. McDonald's alleged co-conspirators were indicted in the Western Division.

Third, the *House* court's observation that it found "little jurisprudence" on the issue of evaluating discriminatory intent in venue selection illustrates why

resolution by this Court is warranted. In *House*, the court explicitly recognized that the defendant was "echoing Justice Marshall's dissent [from denial of *certiorari*] in *Mallett v. Missouri*," 978 P.2d at 993 (citing *Mallett*, 494 U.S. 1009 (1990) (Marshall, J., dissenting)), and proceeded to utilize the *Batson* test. This case marks the third time this Court has been asked to take up this issue and guide lower courts faced with allegations of racially motivated venue selection.

b. Refusing to apply the *Batson* framework to race-based case assignments results in a perverse anomaly. When prosecutors eliminate jurors of a particular race one by one, defendants need only establish a *prima facie* case of discrimination; yet, defendants must prove discriminatory purpose and effect when the government engages in *wholesale exclusion* of members of a race by manipulating venue into a particular forum. Indeed, even when noting its lack of awareness of "any authority to support a conclusion" that an African-American defendant's constitutional rights were violated by a change of venue, the Eighth Circuit nevertheless declared itself "troubled by the state trial court's decision" to change venue to such a county. *Epps v. Iowa*, 901 F.2d 1481, 1483 (8th Cir. 1990).

In the seventeen years since racially-motivated jury gerrymandering was first presented to the Court in *Mallett v. Missouri*, Justice Thurgood Marshall's impassioned arguments have been augmented by the profound split between federal courts (*see Mallett*, 160 F.3d at 460; *Epps*, 901 F.2d at 1483; *Wallace v. Price*, No. 99-231, 2002 WL 31180963, at *54 (W.D. Pa. Oct. 1, 2002) (noting that the *Batson* Court did not suggest its holding would apply to venue transfers)) and state courts (*House*, 978 P.2d at 993-94; *Osmulski*, 638 N.E.2d at 832-34). This case — involving an African-American public official who was the sole defendant among his alleged co-conspirators to be placed on trial in a forum virtually devoid of African-American jurors — provides the Court

with an opportunity to resolve the issue whether the *Batson* framework applies to analysis of prosecutorial manipulation of the case assignment system when race issues are implicated.

c. Respondent's assertion that the claim was not properly preserved for this Court's review, Br. in Opp. 16, is belied by the record. The Ninth Circuit considered petitioner's *Batson* claim and rejected it, holding that petitioner "failed to demonstrate that the Government had a discriminatory purpose in seeking an indictment in the Southern Division" *Id.* There are no facts in dispute, and the record is fully adequate to allow this Court to decide whether the *Batson* framework applies to venue selection. The issue was both pressed to and passed on by the Ninth Circuit and is thus ripe for review by this Court. *See United States v. Williams*, 504 U.S. 36, 41-42 (1992).

d. Respondent argues that the conflict identified by petitioner is illusory. Br. in Opp. 10-12. Respondent rests on the unsteady ground that neither the federal nor state cases cited by petitioner squarely hold that judge-shopping is a *per se* due process violation. *Id.* at 11-12. This contention fundamentally misses the import of the due process implications discussed in those cases. In light of the "special" nature of race in this Court's criminal procedure jurisprudence, *see Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995) (citing to *United States v. Mechanick*, 475 U.S. 66, 70 & n.1 (1986); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam) *Rose v. Mitchell* 443 U.S. 545, 550-59 (1979)), judicial scrutiny of racial gerrymandering should be no less searching than that afforded to race-neutral judge-shopping.

Respondent acknowledges that in *Louisiana v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (on rehearing) (per curiam), the court held — without reservation — that a procedure vesting district attorneys with power to

choose the judge to whom a particular case is assigned violates due process. Br. in Opp. 12. Similarly, the Seventh Circuit observed that a law permitting federal prosecutors to "designate the federal district judge to preside in criminal cases" would "raise *profound* issues under the due process clause." *Tyson*, 50 F.3d at 438 (emphasis added). Nor does respondent dispute that in *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000), the Tenth Circuit recognized that prosecutorial judge-shopping may violate the Due Process Clause. *Pearson*, 203 F.3d at 1259 (citing *United States v. Gallo*, 763 F.2d 1504, 1532 (6th Cir. 1985); *United States v. Erwin*, 155 F.3d 818 (6th Cir. 1998)).

Respondent is thus misguided in asserting that the Ninth Circuit's decision does not conflict with cases that have recognized due process concerns arising from prosecutorial judge-shopping. From the perspective of an African-American criminal defendant, transfer of venue to a forum where virtually no African-Americans reside poses as significant a threat to the defendant's prospects for a fair trial as the prosecution's selection of a specific trial judge within a diverse forum. The Ninth Circuit's decision to permit racial gerrymandering of Mr. McDonald's case into Orange County cannot be reconciled with other courts' expressions of due process concerns triggered by *race-neutral* judge-shopping. That the Ninth Circuit decision is unpublished neither renders the conflict less real nor serves as even an informal bar to certiorari. *See e.g., Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 60 (2000)(noting that circuit decision reviewed was unpublished); *Behrens v. Pelletier*, 516 U.S. 299, 304 (1996)(same).

2. Respondent urges this Court to leave standing a conspiracy conviction based on an admittedly erroneous jury instruction that omitted a critical element of the alleged crime. Br. in Opp. 16-17 While the other Circuits are in accord that when a jury instruction omits an

element, vacatur is required by the Due Process Clause (unless the error is otherwise harmless), the Ninth Circuit idiosyncratically declined to vacate. The panel based its decision solely on the inclusion of an instruction relating to the substantive crime of extortion under color of official right — a crime that applied not to Mr. McDonald but to his co-conspirators.

Respondent relies on three cases in which ambiguous jury instructions were deemed not to warrant reversal — but in none of those cases did the instructions omit an element of the crime charged. To the contrary, the instructions in those cases related to the explanation of defenses or the weight of the evidence. *See Middleton v. McNeil*, 541 U.S. 433 (2004) (per curiam) (direct review of ambiguous instruction regarding the affirmative defense of "imperfect self defense"); *Estelle v. McGuire*, 502 U.S. 62 (1991)(habeas review of instructions related to the operation of the California Evidence Code); *Boyde v. California*, 494 U.S. 370 (1990) (habeas review of instructions regarding the mitigating evidence to be considered at sentencing).

Respondent urges that the prosecution did not rely on an impermissible theory in presenting its case and that the indictment accurately presented the charge. But this misses the point. It is the content of the jury instruction that matters for purposes of the Due Process Clause's requirement that the government prove each element of the crime charged. Here, the conspiracy instruction unconstitutionally relieved the prosecution of the burden of proving a critical element of the crime charged: that petitioner *extorted* money "from another", in this case, Transportation Concepts — i.e., that Transportation Concepts knew it was paying money in return for official acts rather than paying money to petitioner pursuant to a legitimate services contract. Where such a flawed jury instruction would permit conviction on a legally impermissible basis, the conviction should be reversed, even where the jury might have convicted for a

permissible reason. *See Yates v. United States*, 354 U.S. 298, 312 (1957). The Ninth Circuit's radical departure from settled law calls for this Court's intervention.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, this Court should grant the petition for certiorari. The Court may wish to consider summary reversal with respect to the conspiracy conviction.

Respectfully submitted,

Kenneth W. Starr
Counsel of Record
Rick Richmond
Christopher Chiou
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

Jennifer S. Atkins
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

Eric H. Holder, Jr.
Robert A. Long, Jr.
Nicholas Cartier
COVINGTON & BURLING LLP
1201 Penn. Ave., N.W.
Washington, DC 20004
(202) 662-6000

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